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Supreme Court of the United States

OCTOBER TERM, 1954

No. 480

J. ELROY MCCAW and JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, the Tax Commissioner of the Territory of Hawaii, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH DAVIS,
812 Joshua Green Building,
Seattle, Washington.
Attorney for Petitioner.

DAVID INGMAN,
Alexander Young Building,
Honolulu, T. H.,
Of Counsel.

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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, J. Elroy McCaw and John D. Keating, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, dismissing an appeal from the United States District Court for the Territory of Hawaii.

OPINIONS BELOW

The District Court wrote no opinion. However, the District Court's statement to the effect that the District Court had jurisdiction, but refused to exercise the same, appears on pages 466, 467 of the Transcript of Record. The opinion of the Court of Appeals is reported in ..... F.(2d) ....., and is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 30, 1954. An order staying the mandate of the Court of Appeals pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for a Writ of Certiorari, provided such petition was filed in the clerk's office of the Supreme Court of the United States on or before December 20, 1954, was entered on November 12, 1954. The jurisdiction of this court is invoked under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Since the complaint alleged that the Hawaiian tax law was identical with the one struck down by the United States Supreme Court (*Fisher's Blend Stations, Inc., v. State Tax Commission,* 297 U.S. 650, 56 S.Ct. 608, 80 L.ed. 956) and further alleged that broadcasting by its very nature transcended national boundaries and would only submit to a uniform system of ownership and control, and that Congress had preempted the subject matter of radio broadcasting by the Communications Act of 1934, which Act clearly implied that state or territorial legislatures could not legislate upon any part of this subject matter, should not the District or Appellate Court have granted appellants' relief, as a matter of law, since the Motion to Dismiss admitted the truthfulness of such allegations? Especially, when both parties filed motions for summary judgment, thereby admitting there was no dispute in the facts, and a ruling of this Court in a similar case (*Hillsborough v. Cromwell,* 326 U.S. 620, 66 S.Ct. 445, 90 L.ed. 358) held where no other action was pending, and the

appellants' time for appeal had expired, was it not the duty of the District Court to have forthrightly settled this litigation?

2. By admitting jurisdiction existed, did not the District Court abuse its discretionary powers, when by such admission both the District Court and Court of Appeals had to recognize the substantial character of appellants' allegations claiming a valuable Federal right?

3. Should not the Court of Appeals have considered this case as a problem of first instance, as a matter of law, since a Motion to Dismiss and motions for summary judgments had been filed and argued by both parties in the District Court? And, more especially, since the District Court had utilized its discretionary powers, so-called, to abstain from performing its plain judicial duty and thereby coerced the appellants to foresake substantial Federal rights for doubtful and vagrant remedies in a Territorial court where no remedy was actually existent, and questions of serious judicial policy were called to the attention of the Court of Appeals, did not these circumstances compel the Court of Appeals to treat the case as a problem of first instance?

4. Can a "wrong" *ever* become moot as the Court of Appeals stated in dismissing the appeal, where a litigant is relegated to a judicial process of Hawaii where such quaint customs prevail that the winning lawyers write the opinions of the Territorial District Courts? Is this type of "process" due process? Does not the Court of Appeals' refusal to interfere place a

stamp of approval upon that "sort" of process and thus a "wrong" becomes the prevailing law by the cynical passivity of a high Federal Court?

STATUTES INVOLVED

The pertinent provisions of the Communications Act (Title 47 U.S.C.A. Sec. 153, *et seq.*); the Declaratory Judgment Statute (Title 28 U.S.C.A. Sec. 2201); the Territorial Tax Law, involved herein, namely, Chap. 101, Sections 5455, 5535, 5219, Laws of Hawaii, are set forth in Appendix A, *infra,* pages 1A to 5A.

STATEMENT

No suit had been filed by Appellee in any Court for the collection of the tax involved at the time this action was instituted. No action of any kind was pending. Appellants' time for appeal under the tax law involved had expired because for almost two years the Appellee's lawyers, and the local lawyers for Appellants, had been debating academically the constitutionality of the tax law, or lack thereof, among themselves. Finally, it was agreed by the parties that this suit would be initiated in the U. S. District Court for the Territory of Hawaii, in view of the tax law's conflict with the decision of the Supreme Court in the *Fisher's Blend* case (*supra,* and *post*). It is true, jurisdiction cannot be conferred by agreement of the parties, but likewise, it cannot be defeated either if jurisdiction is actually there. In the meantime, while this academic debate was going on, the taxpayers' (appellants') opportunity to appeal to a local board as provided rather vaguely by the law, had expired. It was not designed by either party that such

would happen. The law was new and full of uncertainties. And, while the academic debate was waging, the time for appeal simply tolled. No remedies then existed for appellants in the territorial courts because of the expiration of this right of appeal.

In view of the decision of the Supreme Court of the U. S. in *Hillsborough v. Cromwell,* 326 U.S. 620, 66 S. Ct. 445, 90 L.ed. 358, wherein it was held that a Federal District Court was not required to hold a case until a determination was made by local state courts, the District Court was hard pressed, so to speak, as to how to dispose of the case. A study of the entire Transcript of Record by this Court will throw great light upon the present and justified indignation of the Appellants. The *Cromwell* case, *supra,* was especially important to the Appellants in view of the non-existent and vagrant remedies that were belatedly alleged by Appellee to exist in the territorial courts, but such "remedies" simply *had* to collide with the intellectually indigestible facts that (1) it was the feudal custom for the prevailing counsel to write the "decisions" for the territorial Circuit Courts, (2) the Appellants' right of appeal to any local board under the statute had expired, (3) penalties were not recoverable under Hawaiian Law and thus, (4) no matter whether the tax was legal or illegal, the Territory always made some money by merely being litigious for the penalties (some $25,000.00 as of now) are not recoverable, as hereinafter set forth.

The *Cromwell* case, *supra,* had held that since uncertainty surrounded the New Jersey "Remedy" to protect the taxpayers' federal right, it was a proper exer-

cise of discretion for the federal District Court to proceed to decide the case on its merits in spite of the Johnson Act (Title 28, U.S.C.A., Sec. 1341). In the case at bar, the District Court used the Johnson Act as an excuse to evade its plain judicial duty. The Johnson Act does not apply to the "territories" or even its philosophy, but only to the "states." This court held the statutory three-judge statute (Sec. 2281, Title 28 U.S.C.A.) did not apply to "territories" in *Stainback v. Mo Hock*, 336 U.S. 368, 69 S.Ct. 606. In the *Cromwell* case, *supra*, this court even recognized exceptions for "states" to the application of the Johnson Act. Why, therefore, should a mere "territory" be given a greater sovereignty than New Jersey, one of the "states"?

Issue was joined in the U. S. District Court, wherein an extensive complaint with evidentiary exhibits attached was filed by appellants, and the appellee moved to dismiss with an extensive pleading alleging facts *de hors* the complaint (See Tr. 36 to 113). Respective motions for summary judgment were filed by both parties and the District Court could have ruled on the case as a matter of law (Tr. 113 and 141) and settled this litigation.

At the hearing the lower court stated, p. 467 of Transcript of Record:

> "I am well satisfied that of the causes stated in the complaint this Federal Court *has jurisdiction on a variety of grounds*: Federal question, diversity of citizenship plus three thousand dollars, and the declaratory judgment statute. If wishes controlled, if convenience were a factor, if speed were a factor, I would without hesitation say, 'Let's go on with

the case, the parties are all here, I am reasonably familiar with it, I like working with you folks, I like the case, it presents interesting problems, let's wade into it.' But we all know that those are not legal considerations." (Italics ours)

It was earnestly called to the attention of the District Court that the court was coercing appellants to forego valuable federal rights by its inaction and was compelling appellants to embark upon unknown legal waters where the remedies, if any, were vague, non-existent and repellent; and, that due process of law, as known in our country, could not be obtained in the territorial courts in view of the four cited repellent facts, *supra,* which could not be cured by a lawyer's glibness of tongue or glossed over by the passivity of courts in the past.

There is no provision for *returning* penalties under this tax law in the territorial statutes. Likewise, there is no statutory provision for paying the tax *without the penalties being added thereto.* In fact, the penalty by Hawaiian law, becomes an Hawaiian "realization." The Treasurer of the Territory, if penalties are paid in advance of suit, and as they must be under these fondly described "remedies" by appellee, is prohibited by Secs. 5535 and 5219, Hawaiian Laws, from *repayment* or *refunding.* True, Sec. 1575 of Hawaiian Laws provides that a payment may be made to a "public accountant," not *a court,* but actually to a commercial bank *in the name of the Territorial Collector,* and thus to the Territory itself. That is the way it was paid in the companion case to this case at bar. But, the *later* Secs. 5535 and 5219 govern the *repayment* of such taxes if the tax-

payer wins and one can only recover the "income" and not the penalties, and such are not remedies at all but are legal "snares."

The Hawaiian Treasurer has no right to return the penalties for such become part of the "income" and therefore, if a taxpayer wins, and payment was made under Sec. 1575 Revised Laws of Hawaii, the same "shall become a realization," as set forth in the laws themselves, and the taxpayers' triumph becomes a pyrritic victory.

Sec. 5535, Laws of Hawaii, expressly provides:

> "No taxpayer shall be exempt *from delinquent penalties* by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word *'valuation' shall be deemed to refer to the amount of income."* (Emphasis ours)

Sec. 5219, Laws of Hawaii, expressly provides:

> "The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, *be held by the treasurer in a special deposit* to await the final determination of the appeal. If the final determination *is in whole* or in part *in favor* of the appealing taxpayer, the treasurer shall *repay to him out of such deposit the amount of the tax paid upon the valuation* [*"Income" only,* not the "penalties," as *"valuation"* is described in Sec. 5535 above] *held by the court to have been excessive or non-taxable. The balance,* if any, or the

whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a "realization" under the tax law concerned.*" (Emphasis and note ours)

The "trick" in the above sections is that a "valuation" is described in Sec. 5535 as "income" but when it comes to "refunding" under Sec. 5219, the penalties (now in excess of $25,000.00 in this case) have become a "realization under the tax law concerned." So, win or lose, the Territory cannot help but make some money, so to speak, by merely becoming litigious. These statutes do not provide remedies. They are "a snare," as plaintiff plainly pointed out to the trial court (See Transcript, 271, where the court plainly understood this point).

Again, the District Court stated to appellee (Tr. 313) that a more speedy remedy was in its own court rather than Territorial Courts, and thus unknowingly created another exception to the Johnson Act in favor of appellant, as the Johnson Act requires a "State" remedy to be adequate as well as "speedy":

> "Well, this may not get us anywhere but assuming that it is true that the radio station has only a couple more years to go on its existing license before it applies for a renewal, what I am getting at is, that *this Court* could get you to the Supreme Court faster than the Territorial court could. And you could *collect your tax faster by staying in this Court* than you could by going over to the Territorial court where you would have *one, two, three, four steps to go through* instead of *three over here.*" (Italics ours)

The complaint filed by appellants was extensive and

fully supported by affidavits (See Complaint, Tr. 3 to 30). Appellants' license from the Federal Communications Commission is one for a limited period of time. The conditions precedent to such a grant are set forth in the complaint (Tr. 7 to 29) and such conditions precedent are so many and varied (including *financial, technical* and *character* qualifications), and the regulations of the Federal Communications Commission are so *sensitive,* that the complaint alleged that states and territories could not concern themselves in any way whatsoever with legislation in the field of radio communication, or, with any part of its operations (Tr. 24). Jurisdiction had thus attached to the Federal District Court for the enforcement of a valuable Federal right belonging to the appellants and the rule of discretionary abstention should not have been indulged in to excuse the plain duty of a trial court to hear a justiciable problem of first instance before it, jurisdiction having been conceded by the court.

The District Court toyed with the idea of "retaining jurisdiction" but abandoned it and left the appellants floundering around within a morass of repellant "remedies" in the territorial court (described above). Thus, appellants were forced and coerced into bringing a suit in the Territorial Circuit Court where the Attorney General for Hawaii, as was anticipated, polished up and finally wrote the "decision" for the trial court. The appellee actually "sees" nothing wrong with this "practice." Appellee does not "palm it off" as akin to submitting *Findings* and *Conclusions* or proposed *Instructions,* for Findings and Conclusions were submitted also. Appellee "wrote" this "decision" and this

"practice" (acceptable or nefarious, is for this court to say) is part of the Hawaiian judicial scheme or *"due (?) process."*

In the meantime, appellants appealed this case at bar to the Court of Appeals for the Ninth Circuit. Great expense was incurred to complete a Transcript of Record that would embody all of the allegations of the complaint, the evidentiary exhibits, the appellee's defense, and the entire argument including the colloquy of the District Court so that the Court of Appeals could declare appellants' rights, as a matter of law and as a matter of first instance as was its duty under the circumstances.

However, so much delay was encountered in the Court of Appeals for the Ninth Circuit that the appellants, having been coerced by the inaction of the District Court into paying a substantial amount of money under Sec. 1575, Hawaiian Laws, including penalties which can never be recovered as aforesaid, brought suit to recover such money. Judgment was rendered against the appellants in the local courts, where scant attention was paid to Constitutional questions.

In the meantime, and because of delay in the Court of Appeals, as aforesaid, the appeal of this case (12900 Court of Appeals) which involves different facts and circumstances from the action in the Territorial Court, was consolidated with the appeal to the Court of Appeals (13920 Court of Appeals) of the actions in the Territorial Court (from the Supreme Court of Hawaii which affirmed the lower Territorial Court). Petitions for Certiorari from both decisions are being filed simultaneously herewith, and separately.

The Court of Appeals ruled (see Appendix B) that the wrong committed against the appellants in this case had become "moot." The Court of Appeals paid scant attention to the evidence, or to the record, as shown in the Transcript. In fact, at the argument, the Transcript was derided openly. The exhibits of appellants were not examined at all and at the argument the Court refused to permit their demonstration. On the other hand, in the appeal from the Hawaiian Supreme Court (Cause No. 13920, Court of Appeals), the Court of Appeals was made aware that both parties had solemnly stipulated that a "month's testimony" need not be *printed* but should be sent up in three separate, bound, and legible copies of the reporters' transcript. This effort cost appellant over $2500.00. Yet, this Court of Appeals ruled the "evidence" was "not before it." It was there all right, and pursuant to the rules of that Court and this Court, but it is recognizably quite a chore for some to read 2000 pages of testimony, and the Court of Appeals did not do so. Appellant will cover this travesty in its companion petition filed separately, but simultaneously herewith. The reason for mentioning this now is because the Court of Appeals, between the two records in the two cases, had sufficient "evidence" and grounds to strike down the "practices" complained of for the sake of legal ideals alone, even though it felt it had to hold that tax valid.

To the end that some other hapless litigant, attempting to enforce a Federal right, shall not come abreast of a ruling of a high court that a "wrong" has been made "right" by the use of the word "moot," which has a connotation of cynicism about it, or by the mere pas-

sivity of courts, this petition is being pressed and dedicated—win—lose—or draw—with all the indignation that appellants can muster.

REASONS FOR GRANTING THE WRIT

This case is of vital public significance. Clarification of the law of the case should be forthrightly announced. The few dollars gleaned from broadcasting taxes are not worth the cost of glossing over accepted legal and constitutional principles, and the judicial policies herein assailed.

Opinions of high courts are now in conflict with each other. It is timely and necessary that the Supreme Court of the United States either reaffirm the *Fisher's Blend case,* 297 U.S. 650, 58 S.Ct. 608, or overrule it, for it has been misunderstood and misapplied so many times by those seeking to justify actions of sovereign excess, that it needs reaffirmation more than clarification.

In *Fisher's Blend Stations, Inc. v. State Tax Commission,* 297 U.S. 650, 58 S.Ct. 608, the Court stated on page 610:

> " * * * The essential purposes and indispensible effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission v. Nelson Bond & Mortgage Co.,* 289

U.S. 266, 279, 53 S.Ct. 627, 77 L.Ed. 1166." (Emphasis ours.)

It is noted that the Supreme Court says in the *Fisher's Blend* case, speaking through Mr. Justice Stone in 1936, that "ALL" broadcasting was interstate commerce. The court did not say "a 5,000-watt station"; the court said *"all broadcasting."* Nor did the Supreme Court say anything about State Courts being the determinative agents "of the sphere of commercial value of such broadcasting," as the Hawaiian Supreme Court held. Nor, do appellants adopt the view of the Supreme Court of Hawaii or the Court of Appeals that Mr. Justice Stone was referring to "characteristics" of broadcasting, in the latter part of his opinion, as modifying the earlier part where the Supreme Court ruled that "all" broadcasting was interstate commerce. The *Fisher's Blend* case was reaffirmed and *augmented in Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 58 S.Ct. 546, 82 L.ed. 823, which paradoxically enough is a case relied upon by the appellee. Mr. Justice Stone rendered the opinion of the court also in the *Western Live Stock* case on February 28, 1938, and the case was argued on the theory of "multiple burden" taxation. This case involved a suit by a magazine in New Mexico to prevent a gross receipts tax from being assessed on its distribution of magazines and the magazine publisher (appellant) relied upon the *Fisher's Blend* case. On page 551, in discussing the *Fisher's Blend* case as applied to the *Western Live Stock* case, Mr. Justice Stone, the same judge who rendered the opinion in the *Fisher's Blend* case, speaking for the court, stated:

"* * * In this and other ways the case differs from *Fisher's Blend Station, Inc. v. State Tax Comm'n., supra,* on which appellants rely. There the exaction was a privilege tax laid upon the *occupation of broadcasting,* which the court held was *itself* interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. *If broadcasting could be taxed, so also could reception. Station WBT, Inc. v. Poulnot,* D.C., 46 F.(2d) 671." (Emphasis ours.)

"Great Britain levies an annual license tax on radio receiving apparatus.

"* * * In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed."

Thus the Supreme Court augmented its prior holding and brought the *Fisher's Blend* case into the "multiple burden" rule and a second defense for appellant in this case. There is a noticeable absence of this case's ruling in the State Court rulings relied on by appellees (Arkansas and New Mexico decisions, *post*). We repeat what the court said: *"if broadcasting could be taxed, so also could reception."*

The fact that reception is not taxed does not make the tax as to broadcasting valid. Each is essential to the other. The *mere possibility* that reception could be so taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. At this time, we call attention to the fact that Mr. Justice Stone did NOT cite the *Fisher's Blend* case in the *Western Live Stock* case a case *of limited application,*

or as one confined to a *"stipulated set of facts,"* as does appellee and the Court of Appeals.

All local sales, "services," "activities" and "instrumentalities" of appellant exist solely for the single purpose of projecting its final act—its signal—into space. Without this *final* act, all prior acts and activities of appellant would be useless. Conversely, without the *prior acts* (*i.e.,* sales, services, instrumentalities, etc.), the final act—the projection of appellant's signal into space—could not be accomplished. Thus, as defined by the Communications Act, appellant's activities are all inextricably interstate, regardless of an incidence or so of local activity. All activities of appellants are inseparable from its purpose for existence—namely, to broadcast.

Radio broadcasting consists of *three* indispensible elements, namely, (1) *the transmitter,* (2) the connecting medium, or *the ether,* and (3) *a receiving set.* A loss of any one of the three and you have nothing. Each is indispensible to the other. Thus *the transmitter* (1) is so essentially a part of (2) the connecting medium or *the ether* and (3) *the receiving set,* that you could not have broadcasting without reception or the connecting medium, the ether. All local activities, such as sales, programming, etc., are defined in Section 153, Title 47, U.S.C.A., as *"instrumentalities, facilities, and services incidental to such transmission."*

Congress pre-empted the "financial" aspects of a radio station's existence by affirmatively writing the word "financial" in the statute. The Federal control on the subject was so complete that even had Congress not

used the word "financial," the mere silence of Congress on the subject would have amounted to a prohibition of a state to have considered the "economic" or "financial" aspects of a radio station. Congress affirmatively used the word "financial" and the Federal Communications Commission concerns itself with the "economic" and "financial" aspects of a station, under the Act of Congress. The Commission will only let a station earn 70% of its potential. All other businesses can earn 100%. But not radio. It must *give* 30% of its time to the public interest without charge "in lieu of taxes." That is the only meaning to this hard and fast rule of the Communications Commission. Therefore radio has only 70% of its earning potential left. The Territory seeks to whittle that down. Congress was ahead of the Territory, however, and pre-empted the "financial" aspects of radio. State taxes affect the "economic" and "financial" aspects of a station; therefore a state must give way to a superior Federal control on the subject matter.

The Federal Communications Commission in March, 1946, issued its "Blue Book" (Tr. 10) wherein the Federal Communications Commission declared its jurisdiction over the "Economic Aspects" of a broadcast licensee. "Economic Aspects" include "financial" (Act of Congress includes the word "financial") aspects (See Complaint). The Commission declared that radio could only have an earning potential of 70%. The Territory wants to whittle it down to 67½% and give utterly no service for its "take." If it "gets away" with this much, it will take more. So will other states. Then, radio is back where it was before 1934.

States do not and cannot perform a single service to radio. Territories would do less.

The Supreme Court held in 1940 that "financial qualifications to operate a proposed station" was an important element of "public interest requirements." See *F.C.C. v. Sanders Bros.*, 309 U.S. 470, 60 S.Ct. 693, 84 L.ed. 869. Also, "economic injury," in *Colorado Radio v. F.C.C.* (1941) 118 F.(2d) 24, to a radio broadcasting station licensee was held relevant on the issue of public interest as to whether a license should be granted. To the same effect, see *Heitmeyer v. F.C.C.* (1938) 95 F.2d) 91; *Stuart v. F.C.C.* (1939) 105 F.(2d) 788. See *Saginaw Broadcasting v. F.C.C.* (1938) 96 F. (2d) 554 (Cert. denied, 59 S.Ct. 72) where it was held to be a duty of the F.C.C. to make a finding of adequate financial support as a basis of granting a license. Thus, it is clear that the subject of "finances" has been assumed by the Commission, to the exclusion of a state, especially a Territory of archaic and feudal tendencies where the "winning" lawyers write the "decisions" of its courts, if one can call them judicial "decisions."

However, in spite of the foregoing assumption of control by the Federal Communications Commission of the "Economic Aspects" of radio licenses; and, in spite of laws and decisions of the Federal Courts (*supra* and *post*), the States of Arkansas and New Mexico in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting Co. v. Revenue* (1950) 215 P.(2d) 819, decided flat license fees were valid. Attempt was made in New Mexico to appeal to a Three-Judge Federal Court, but the Federal Court, while holding

radio was interstate commerce, was thwarted by complainants prior action in submitting to state jurisdiction and the Johnson Act (Section 1341, U.S.C.A.) was held to prohibit that court from granting relief. (Contrary—*Cromwell* case, *supra.*)

Mere denials by the Supreme Court of appeals from these decisions are now considered by the Court of Appeals as having overruled the *Fisher's Blend,* the *KVL, NBC,* and *Western Live Stock* cases (*supra* and *post*).

If the Court has doubt that a uniform national system of control over radio, precluding any state taxes whatsoever on the subject matter, was not the intention of Congress, then such a declaration should be made forthrightly. If the "Government does NOT "own" the *ether* above its domain, who does? No tax should ever be allowed to be collected under the guise of innuendo, indirection, confusion, or misinterpretation. Such lead to legal indignity. These "economic aspects" must be cleared up (See *Dumont v. Carroll,* 184 F.(2d) 153). For, if the states can tax at all, the present tax of two and one-half per cent can be raised to ten per cent and thus will be accomplished the second "breakdown" in communications, which Congress intended should never happen in 1934.

The *ether* is unlike the airways, where the owners of land may be held to have some rights to the air over which airplanes fly. (See recent case of *Braniff Airways v. Nebraska,* 347 U.S. 590, 74 S.Ct. 757, where this Court said the C.A.A.'s regulatory powers were *not* bottomed on *ownership* of the air.) However, this indispensable element of broadcasting, namely, the

"ether," has to be *owned* exclusively by the Sovereigns. It has to be. World conferences are held, to which the United States and all nations are signatories, to allocate radio frequencies among themselves to avoid international confusion. Radio waves know no frontiers. The *ether,* or space in which radio signals travel, is incapable of private ownership. However, no such international conferences or agreements are needed for airplanes. The appellants' frequency *must* be filed in Switzerland. That is *not* true of Braniff Airways.

Thus, the case at Bar should have been decided as a matter of law, in favor of appellants. The evidence and exhibits showing the radio spectrum of the world, as allocated by the World Conference, was attached to the complaint. There were no facts capable of dispute in this case as indicated by mutual motions for summary judgment. That is—until appellee saw a chance to create fictional "facts," by hoping for a limited interpretation on the *Fisher's Blend* case (*supra*) through seizing on the point that the "facts" in that case were "stipulated," and ignoring its broader interpretation in the *Western Live Stock* case (*supra*). The Federal Communications Commission is not just interested in "policing" or "regulation" as is the body regulating airlines.

> "The *Communications Act did not create new private rights.*" (Italics ours.)
>
> *Scripps Howard v. F.C.C.,* 316 U.S. 4, 62 S.Ct. 875, 86 L.ed. 1229.
>
> "A licensed broadcasting station must operate in the public interest and is a *trustee* for the public." (Italics ours.)

McIntire v. Penna. Broadcasting, 151 F.(2d) 597.

The Supreme Court has held many times that the question of whether a field has been pre-empted by the Congress to the exclusion of any concern by the states, turns upon the *sensitivity* of the field so pre-empted. The complaint, appellants' exhibits, and all the evidence clearly showed that there is no commerce as sensitive in the modern world as radio. The *ether must* be owned by the public. It is incapable of being owned privately.

The license granted to appellants, marked Exhibit "F," in the complaint (Tr. 12) expressly excludes the licencee from claiming *any property right* in the use of any particular frequency "or of the ether."

For a history of radio broadcasting before the Supreme Court see *National Broadcasting Company v. Federal Communications Commission,* 319 U.S. 190, 63 S.Ct. 997, 87 L.ed. 1344, which held that the Federal Communications Commission was more than "a mere policing organization."

The case of *Dumont Lab. v. Carroll,* 84 F.Supp. 813 (Penna., D.C.) (Aff'md. Cir. Ct. of App., Penna.) 184 F.(2d) 153 (Cert. to this court denied) in striking down censorship of television films by the State of Pennsylvania, held:

> "I am satisfied that in the field of television there has been a plenary exercised by Congress of the power to regulate and a complete occupation of the field, including censorship. Under the comprehensive scheme of regulation established by the Communications Act, the Commission can exercise effective control over the content of programs, and

the fact that this scheme eliminates one particular method of control, namely, censorship in advance of showing, in favor of a less drastic one does not mean that that field is left untouched."

1. (a) This same identical tax (Hawaiian tax) was struck down in the *Fisher's Blend* case, *supra,* and at the same term of this Court, and before the *Fisher's Blend* case, but in the same report the tax was held good as against a telephone company. See *Pac. Tel. & Tel. Co. v. Gallagher,* 306 U.S. 182, 59 S.Ct. 396, 85 L.ed. 595.

Application of cases dealing with taxes upon express companies, railroads, sleeping cars, telegraph companies or the production of electric power are therefore inapplicable to the case at Bar.

This tax is not really a tax upon the "business" of broadcasting. It is a tax upon its "operations." There is a distinction between the two for Congress has preempted the subject mater of a station's "operations," even though the "business" is "private." Yet, the F.C.C. says too, the "business" of a radio station can *only* earn 70% of its potential (*supra*).

There is a substantial federal question involved in *this* petition. In *Beard v. Vinsonhaler,* 338 U.S. 863, where an appeal was dismissed, there was a *license tax* of only a few dollars involved. Obviously, there was no substantial federal question. In this case at Bar there are substantial federal questions, *i.e.,* (1) a tax on "operations" and not just a business tax, (2) a conflict where the territorial courts state that it and other state courts now have the right to determine as to which radio station is engaged in interstate commerce or is not,

depending upon the extent to which its signal is "commercially receivable."

The decision of the Supreme Court of Hawaii (*McCaw v. Fase,* 40 Haw. 121) (Companion case to this case) is now in direct conflict with the regulatory power of the F.C.C. and the prior decisions of this court.

If appellants are not in interstate commerce, as measured by the intensity of its signal, then it follows that the F.C.C. should not concern itself with appellants' business. The Hawaiian Supreme Court held in this case that the Territories and States will determine as to which radio station *is or is not* in interstate commerce. The Court stated:

> "Upon such premise, we hold that neither distance at which emanations are receivable, nor classification for control and regulation, but the sphere of actual commercial value, is the criterion for determination of whether broadcasting is 'intrastate,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation."

In *National Broadcasting Co. v. United States* (*supra*), the Supreme Court took a different view:

> "* * * The Commission's licensing function cannot be discharged, therefore, merely by finding that there *are no technological objections to the granting of a license.* If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? * * *

"* * * The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all of the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers *to promote* and *realize* the vast potentialities of radio. * * *

"* * * These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority. * * *

"* * * In the contex of the developing problems to which it was directed, the Act gave the Commission not niggardly but *expansive* powers. It was given *a comprehensive mandate* to 'encourage the larger and more effective use of radio in the public interest,' if need be, by making 'special regulations applicable to radio stations engaged in chain broadcasting.' " (Italics ours)

The Supreme Court of Hawaii, has in effect found now that state legislatures and state courts should ignore the distance at which emanations are "receivable" and "classification (by the F.C.C.) for control and regulation," and should establish their own "criterion for determining of whether broadcasting is 'intrastate' or 'interstate'." The "advice" of the Supreme Court of the United States in the *National Broadcasting* case (*supra*) can now be dispensed with according to this decision. The Hawaiian Supreme Court has now held that the States (and Territories with the "winning" lawyers writing the decisions, of course)

will handle the technological as well as the other criteria which Congress thought it endowed the F.C.C. to do and of which the Supreme Court of the United States spoke in the *National Broadcasting* case (*supra*).

A few words of the late Mr. Justice Jackson are apropos. In the case of *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.ed. 1283, wherein he concurred with the majority in confining a state tax on personal property of an airline to that state (Later overruled, and turning on the question of "regulation" as opposed to "ownership" of the air), the late Mr. Justice Jackson said:

> "Congress has recognized the National responsibility for regulating air commerce. Federal control is intensive and exclusive. *Planes do not wander about in the sky like vagrant clouds.*" (Italics ours)

Nor are radio signals aimlessly propagated, no matter the wattage. The intensity of the Federal control, and the sensitivity thereof, must now be clarified because of the conflicting opinions of courts.

The Supreme Court augmented and brought the *Fisher's Blend* case (*supra*) into the "multiple burden" rule. There is a noticeable absence of this case's entire philosophy in the decision of the Court of Appeals and the State Court rulings relied on by appellee (Arkansas and New Mexico decisions—*supra*).

We repeat what the Supreme Court said *"if broadcasting could be taxed, so also could reception"* (*Western Live Stock* case, *supra*). This was *not* a limited statement confined to stipulated facts. The fact that reception is not taxed, however, does not make the tax on broadcasting valid. The *mere possibility* that recep-

tion could be taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. For, without one, you could not have the other.

In the case of *Joseph v. Carter and Weekes,* 330 U.S. 422, 67 S.Ct. 815, 91 L.ed. 993 (1947), a gross receipts tax was declared invalid although the possibility of "multiple burden" taxation did not in fact exist. The tax in the *Carter-Weekes* case arose out of a local excise tax law of the City of New York imposing a two per cent excise tax on the business of stevedoring; that is, loading and unloading of ships, in a New York harbor. The City of New York contended the taxable activity, as the appellee in the case at bar contends the activity of radio, was a local activity of loading and unloading of ships, and the taxable event was so completely disjointed from the actual commerce as to characterize it as an intra-state activity. That is exactly the position the appellee in the case at bar takes with relation to broadcasting. Appelle states that broadcasting in Hawaii is purely an intra-teritorial activity and that reception is a mere incident thereto, whether far or near and depending on "the commercial value," not the intensity of the signal, the criteria under which a station is licensed by the F.C.C. This contention is made despite the fact Hawaii is encompassed by the Act (see *supra*); and not withstanding, every taxicab, or small boat that has a transmitter must obtain a F.C.C. license to use and operate such.

The Supreme Court of the United States (1947) disagreed with New York City and held that the activity

of stevedoring was so essentially a part of the commerce itself that the tax was illegal.

In other words, the court reasoned that "if a ship is loaded, it must be unloaded," so to speak. This Court did not say that the "commercial value" (whether loading or unloading scrap steel or diamonds) was the "criteria" for determining whether the activity was *intra-state* or *interstate* commerce, as did the Hawaiian Supreme Court. Broadcasting is akin to "shiploading" —if "intelligence is broadcast, it has to be received," somewhere—far or near, regardless of its value. The court stated:

> " * * * Stevedoring, we conclude, is essentially a part of the commerce itself and, therefore, a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by these gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.' *Freeman v. Hewit, supra*, 329 U.S. 249, 256, 67 S.Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effect of state legislation and its actual or probable consequences. Not only does it follow a line of precedence outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus, in port cities or transportation or handling centers, without dis-

> crimination against outstate as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

2. The District Court should have granted the appellants' Motion for Summary Judgment especially when it was joined in by appellee (Tr. 113-141). A motion to dismiss was filed which admitted the truthfulness of the complaint. The motion to dismiss filed was more than the ordinary Motion to Dismiss. The Motion to Dismiss filed by Appellee was a document which consisted of 47 *printed* pages. It is set forth completely in the Transcript of Record from page 36 to page 113. It consisted of maps, financial statements and every conceivable argument which could be conjured by appellee. Appellee filed a motion for summary judgment. So did the Appellants. The U. S. District Court could have ruled on the subject then and there and it was an abuse of discretion not to do so.

National Broadcasting Company v. Federal Communications Commission (*supra*) (the "chain broadcasting decision") a case of monumental proportions, was decided on a motion for summary judgment. This case at Bar could have been so disposed of. There were no disputed facts. The "facts" belatedly conjured by appellee were brought forth to attempt to distinguish the "stipulated" facts of the *Fisher's Blend* case. In the *Western Live Stock* case (*supra*), where the *Fisher's Blend* case was reaffirmed, with new vigor, nothing was said about "stipulated facts" limiting its application.

The Johnson Act (Section 1341, U.S.C.A.) does not apply to "Territories" any more than the Three Judge Federal Court Statute (28 U.S.C.A., Sections 2281-84). The Supreme Court in *Stainback v. Mo Hock,* 336 U.S. 368, 69 S.Ct. 606, 93 L.ed. 741, held that the Three Judge Statute's reference to "states" did not apply to "Territories." This decision was in 1949. The revised Judicial Code was enacted and signed by the President in June, 1948. If Congress had *intended* that Section 1341 (Johnson Act) should include the word "Territories," Congress would have so enacted such into law as it did just a few sections before 1341, where in Section 1332 at the same session (1948), Congress inserted subsection B of the Diversity Section, stating:

> (B) "The word 'states' as used in this Section, includes the Territories and the District of Columbia." (June 25, 1948)

Thus, the erroneous policy of judicial absention, or discretionary absention, as applied to this case, is met at the outset with negation by this plain expressed intent of Congress. Congress enacted the Declaratory Remedy. Judicial process is intended to effectuate, not congeal Congressional policy. The Declaratory Act is plain.

Under Rule 57, Rules of Civil Procedure, a right to trial by jury is given under the Declaratory Act, and this implies that the Act was to be more than a mere "discretionary" judicial *grant* of the District Courts. On the contrary, plain reading discloses it to be a valuable *right* to a citizen.

Rule 57. Declaratory Judgments.

"The procedure for obtaining a declaratory

judgment pursuant to Title 28, U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

In reason it is difficult to see how this statute and rule can become so emasculated without omission on the part of the District Courts. The Declaratory Statute is neither legal nor equitable, but a Civil action (Section 38.29, Moore's Federal Practice (2nd Edition)). Thus, the only way emasculation and confusion can enuse over the application of this *right* is by an abuse of judicial discretion.

A litigant is entitled to a complete and full hearing—a searching inquiry into his allegations, and to just as much solicitude for his *rights* as the court expresses for the *rights* of an excessive sovereign. All of this is supposed to be known by an experienced trial judge. The District Court stated, in substance, "Jurisdiction obtained; the parties are all here—am familiar with the case, etc. * * * " (Tr. 467). No other action was pending. Why wasn't the case decided? Why were Appellants coerced into a local forum where *the prevailing lawyers write the decisions of the courts?* (Hawaiian Circuit Court Practice—see *supra.*) Why was the expressed law of Hawaii denying refunds of penalties and excessive interest glossed over? Why is a Territory entitled to be protected in its wrongdoing by indirect and

omissive action of the District Courts? This Court did not let it happen in New Jersey (*Cromwell* case, *supra*).

The Congress did not intend, ever, to deprive litigants of their lawful claims or defenses by permitting an abstract personal conception of justice by an individual judge, or a personal conception of a court's power, to be substituted for Federal statutory rights or for rights recognized by rules of substantive law.

It becomes harmful, if rights flowing from Federal statutes or from the Federal statutory scheme for the administration of justice are deliberately ignored or displaced by an assumption of a court's power and duty that could lead only to unjustified expense, and to its consequent sequel, disrespect for all law. In other words, if Congress gives a citizen a right, can a court admit its jurisdiction to award that right but withhold it on a mere caprice of its own? If it can, then Congress has performed a useless function.

No judicial scheme for the administration of justice can be premised upon the transitory predelictions of an individual judge. If so, there can be no integrity in the law. It is for this reason that the term "judicial discretion" is a limited one, and should never be allowed to overpower statutory rights, or those uniform and settled rights flowing from *stare decisis*. The public cannot abide by or adhere to law unless it has uniformity and certainty and just as much concern for the citizen as for an excessive sovereign.

Congress gave the Federal courts power to "declare" rights where issues were confused. It, therefore, becomes a duty for a court to declare rights where juris-

dictional requirements are met. This duty is primary and prescribed and cannot be shrugged off by a capricious adaptation of the term "Judicial Discretion," to the end that the phrase, as practiced upon Appellants by the District Court in Hawaii, is but a legal alchemy whereby there is precipitated a denial of recognized rules of substantive law and Federal rights flowing from a Federal statute.

Excessive concern of the courts for "excessive" sovereigns makes the term "comity," when misapplied as here, a mawkish term in the light of the definition of "judicial review." Failure of a court to do its plain duty, and adopting a policy of indecision by the use of the term "judicial discretion" does not constitute "judicial review," to which the most impoverished citizen is entitled. If so, then "judicial discretion" becomes an unknown, surprising and unstudied legal mixture, precipitating caprice as a synthesis for law and statutory rights. If "judicial discretion" can be used to withhold rights flowing from a Federal statute, or to deny "judicial review" of or a "declaration" on substantial and admitted Federal questions in spite of a prescribed duty to do so, then the power of a District judge becomes uneasily superior to the legislative branch of the government, when equal balance was constitutionally intended.

And, by failure of the Court of Appeals to show other than a cynical passivity to such an abuse of discretion, gives rise to an immediate and thoughtful concern.

The Court of Appeals' decision that this action is "moot" and should be dismissed runs counter to one of

Mr. Justice Frankfurter's statements in the case of *Mullaney v. Anderson,* 342 U.S. 415, 72 S.Ct. 428, 96 L.ed. 458, wherein the court stated:

> "To dismiss the present petition and require the new Plaintiffs to start over in the District Court would entail needless waste and run counter to effective judicial administration * * * "

The withholding of statutory rights, or refusing to decide admitted substantial federal questions, jurisdiction obtaining, under the guise of "judicial abstention," even with the best of intentions, is dangerous and leads but to coercion. It is better to decide the issue, jurisdiction admittedly obtaining, or even if doubt prevailed, than the adoption of a policy of indecision, erroneously based upon a misapplication of a statute or a rule of law (Johnson Act and its philosophy).

By refusing to adhere to the plain prescribed new remedy as afforded by the Declaratory Act, jurisdiction as a Federal court existing as the court admitted, and refusing to function as a court to judicially review excessive acts of a sovereign simply because of an unsound and unwisely conjured policy of "abstention" because a sovereign is involved, a court thereby sloughs off its robes of judicial office and subconsciously becomes a "legislator." But, in doing so, it unwittingly frustrates the statutory scheme for judicial review by shifting to higher courts the District Court's primary and prescribed responsibility for a judicial review of the acts complained of in Appellants' Complaint.

Judicial "legislation" was indulged and utilized here with an undisguised frankness for the solicitude of an excessive territorial sovereign to the detriment of

citizens of the United States—the Appellants. In addition, the Transcript of Record will show an appalling lack of care on the part of the District Court or any thought about adding to Appellant's woes, through its policy of indecision. The principle of "judicial discretion" was expanded beyond the limit of its logic in this case and a defeat of Congressional philosophy and policy, as expressed in the Declaratory Judgment Act, resulted. A policy of solicitude to an excessive sovereign, conveyed through a forthright policy of indecision, cannot be fitted into any category of equitable jurisprudence. There is nothing equitable about it.

"Comity" had nothing to do with this case. There was no "state" involved (*Stainback case, Supra*). There was no "pending" action or actions in the Territorial Court. "Discretion" was misapplied for its application aided an alleged wrongdoer—an excessive sovereign—who, at this stage of the proceedings, admitted its excessiveness by its motion to dismiss. Yet in effect, and by this decision, a wrongdoer, as long as it is a "sovereign" of a sort—even less than a state—can now challenge and overwhelm a citizen of his rights to a judicial review where process is "due process" and not that "sort" of process prevailing in Hawaii.

It was timely for a declaration of appellants' rights by a Federal Court. Two states, Arkansas and New Mexico (in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting v. Revenue* (1950) 215 P.(2d) 819) had ruled diametrically opposite to the *Fishers Blend* case (*supra*) and ignored the Supreme Court's augmentation of its prior holding in the *Western Live Stock* case (*supra*). Confusion prevailed as to

Appellants' rights. Appellants were entitled to a Federal Court ruling on Federal questions, since an appeal was denied by the Supreme Court from one of these State Court decisions, and the territory took the position this denial of an appeal overturned the *Fisher* case (*supra*).

3. The case of *Hillsborough v. Cromwell,* 326 U.S. 620, 66 Sup. Ct. 445, 90 L.ed. 358, is extremely apt to this case. The complaint of appellants alleged that the time for appeal had expired. Appellee does not deny that. In fact appellee belatedly promised to "sue" appellants to "create" an "adequate" remedy "after the fact," so to speak, if the District Court would dismiss the case. The District Court, after the danger of the non-recovery of penalties was pointed out, suggested appellants could become "defendants" (Tr. 232) apparently believing through some fascinating rule of logic, entirely original with the District Court, that such a reallignment of the parties would make up for the inadequacy of the Hawaiian remedies as to the recovery of penalties and interest.

In *Hillsborough v. Cromwell,* 326 U.S. 620, 66 Sup. Ct. 445, the taxpayer's opportunity to appeal to a New Jersey Board of Tax Appeals had expired before the Federal District Court ruled on a motion to dismiss the taxpayers' action for a declaratory judgment that the assessments were void. It was not clear there, as it is clear in the case at bar on the non-recovery of penalties, that the taxpayer had open any adequate remedy for challenging the assessment on local grounds and it was held that the Federal Court was not required to hold

the case until a determination of local law was made by the state courts. A remedy at law cannot be considered as adequate so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. In the case at bar, we did not just challenge the penalties, but the entire tax.

Even though the New Jersey remedy on the local law question was available to the taxpayer, who claimed to have been singled out for discriminating taxation, an uncertainty surrounded the New Jersey remedy to protect the taxpayer's federal right, as here at bar, and a refusal of the Federal Court to dismiss a bill for a declaratory judgment that the assessments were void, was held to be a proper exercise of discretion by the Supreme Court and the Federal District Court was held to have properly proceeded to decide the case on the merits. This was so in spite of the Johnson Act. The Supreme Court held that the uncertainty surrounding the New Jersey remedy to protect the taxpayer's federal rights justified the Federal District Court in proceeding to decide the merits of a taxpayer's bill for declaratory judgment that the New Jersey assessments were void. The Supreme Court held that the fact the court placed its decision on local grounds was not objectionable. Here at bar, Appellants claim that almost $25,000.00 in penalties and interest will be unlawfully "taken" by Hawaii. The Hawaiian statutes say "they will become a realization" (*supra*). There is not even any uncertainty about that Anent mere "uncertainty," the Supreme Court went on to say in this case:

> "In the present cases, it appears that respondent's opportunity to appeal to the State Board of

Tax Appeals had expired even before the District Court ruled on the motion to dismiss and it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds.

"It follows that the bill should not have been dismissed. As stated in *Greene v. Louisville*, 244 U.S. 499, 520, 37 S.Ct. 673, 682, 'a remedy at law cannot be considered adequate so as to prevent equitable relief, unless it covers the entire case made by the bill of equity.'

"Though the availability of a state remedy on the local law question be assumed to exist, so much uncertainty surrounds the New Jersey remedy to protect the taxpayer's federal right that a refusal to dismiss the bill was a proper exercise of discretion. Thus, however, the case may be viewed, the exceptional circumstances which we have noted take it out of the general rule in *Great Lakes Dredge & Dock Co. v. Huffman* (319 U.S. 293, 63 S.Ct. 1070, 87 L.ed. 140). The district court therefore properly proceeded to decide the case on its merits. That it placed its decision on local law grounds is not objectionable. For it is well settled that where the Federal Court has jurisdiction it may pass on the whole case. * * * "

The Supreme Court held also in *Brown v. Western Railway*, 70 Sup. Ct. 105, that a federal right cannot be defeated by forms of local practice and the Supreme Court held it could not accept as final a state court's interpretation of allegations in a complaint asserting a federal right. Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.

Appellants refer to the *Stainback* case, 336 U.S. 368, 69 Sup. Ct. 606 (*supra*). That case did not turn simply and alone on the question of "protecting" the appellate court's "convenience" and we quote the court as follows:

> " * * * While, of course, great respect is to be paid to the enactments of a territorial legislature by all courts as it is to the adjudications of territorial courts, the *predominant* reason for the enactment of Judicial Code Section 266 does not exist as respects territories. This reason was a Congressional purpose to avoid unnecessary interference with the laws of a sovereign state. In our dual system of Government, *the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory.* A territory is subject to Congressional regulation." (Italics ours)

The foregoing decision does not in any way detract from the powers and duties of a Federal Court in Hawaii as compared with the constitutional Federal Courts on the mainland. But, it did not give the Federal Court in Hawaii the right to "legislate" either, or to avoid his plain judicial duty. Congress simply did not write the word "Territories" into the Three-Judge Court Act or into Section 1341, the Johnson Act. The courts cannot "legislate" those words into Congressional enactments. The Congress only can do that.

The time had expired for any local remedy, even if the Johnson Act did apply, prior to appellants going into the District Court. There was no provision in the Hawaiia law for the recovery of penalties in case the

law was held invalid even if the money were paid to a local "public accountant" as insisted by appellee. On the contrary, the statute (*supra*) provides only the "income" can be returned, and not the penalties, which become an Hawaiian "realization." This is an unconstitutional "taking." If the law were held invalid, the "income" paid could be recoverable, but the penalties are confiscated in violation of plaintiffs' constitutional rights. No provision exists for their return. In fact, Sections 5535 and 5219 Hawaii law (*supra* and *post*) remove any "uncertainty" and say they shall be "realizations" or mere "prizes," as you will, of the Territory. No appeal could be taken through the local courts for the recovery of these penalties.

The case of *Georgia Railroad and Banking v. Redwine,* 342 U.S. 299, 72 S.Ct. 321, 96 L.ed. 325 holds that an adequate state remedy existing as to only a portion of state taxes, the assessment and collection of which was sought to be enjoined in a Federal District Court, does not dispossess the Federal Court of jurisdiction over *the entire controversy.* Here, the inadequacy of a remedy for the return of the penalties was in question. That alone afforded Federal jurisdiction, and the appellants are entitled to have their case tried other than by piecemeal. The *Georgia Banking* case, *supra,* cited the following note:

> "An adequate remedy as to only a portion of the taxes in controversy does not deprive the Federal Court of jurisdiction over the entire controversy." *Greene v. Louisville I. R. Co.,* 244 U.S. 499, 72 S.Ct. 321, 96 L.ed. 335; *Hillsborough v. Cromwell, supra.*

4. No suit was pending in the Territory between these parties at the time this action was initiated.

All of the essential elements of jurisdiction were present. The issues were plainly ones of law by virtue of both parties filing Motions for Summary Judgment. The ruling of the Supreme Court in *National Broadcasting v. U.S.*, 319 U.S. 190, 63 S.Ct. 997, not only made the controversy one of law, but a justiciable case because of conflict and confusion over the law. There were then and now decisions by high Federal Courts in conflict with high State Courts' decisions that called for a Declaration of Appellants' Rights under the Federal Declaratory Statute.

The Court of Appeals held that the wrong committed against the appellants was now "moot." It was pointed out in the argument before the Court of Appeals that the repellent "remedies" in the territorial courts, such as penalties becoming Hawaiian "realizations," and the custom of the "prevailing lawyers" writing the decisions of the local territorial courts was offensive and a denial of due process, and that a denial of due process could never become "moot." The Court of Appeals attempted to pass it off as akin to lawyers submitting findings of fact and conclusions of law. One of them, however (Judge Orr) stated there was a difference.

The question of judicial policy and lack of process alone, engendered by this unique and quaint practice of "winning lawyers" writing the opinions of judges, is sufficient to justify a review of this case. That infamous practice will never become "moot" to the appellants and many other citizens.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be granted. The case presents issues which are not only important in the future administration of the Federal Communications Act, but to the states, and to the radio industry, and the case is also of pressing significance to the extent of future governmental rights and duties over the vast "properties" in the ether, the extent of which is not yet known.

Respectfully submitted,

KENNETH DAVIS
Attorney for Petitioners.

DAVID INGMAN
of Counsel.

APPENDIX A

STATUTORY PROVISIONS

Title 47, U.S.C.A., Sec. 153, Subsection B:

"Section 153. Definitions.

"For the purposes of this chapter, unless the context otherwise requires—

"(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalies, facilities, apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

"(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all *instrumentalities, facilities,* apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) *incidental* to such transmission.

"(d) 'Transmission of energy by radio' or *'radio transmission of energy'* includes both such transmission and all instrumentalities, facilities, *and services incidental* to such transmission.

"(k) 'Radio station' or 'station' means a station equipped to engage in radio communication or *radio transmission of energy.*" (Italics ours)

Title 47, U.S.C.A. Sec. 301:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States

over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof, by persons* for limited period of time, under licenses granted by Federal authority, and no such license shall be construed to create *any right,* beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

Title 47, U.S.C.A. Section 303:

"'Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"'(a) Classify radio stations;

"'(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

"'(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * *;

"'(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

"'(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * *

"'(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * *"

DECLARATORY ACT

Title 28, U.S.C.A. Sec. 2201, Creation of Remedy:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief

is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, Sec. 111, 63 Stat. 105."

FEDERAL RULES OF CIVIL PROCEDURE

Rule 57, Federal Rules of Civil Procedure, Declaratory Judgments:

"The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

HAWAIIAN LAWS INVOLVED

"Sec. 5455, Hawaiian Laws, Imposition of Tax. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

* * *

"D. Tax upon theaters, amusements, radio broadcasting stations, etc. Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are

offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business."

Section 5535, Laws of Hawaii:

"No taxpayer shall be exempt from delinquent *penalties* by reason of having made an *appeal on* his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word '*valuation' shall be deemed to refer to the amount of income.*" (Law 1945) (Italics ours)

Section 5219, Laws of Hawaii:

"The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, be held by the treasurer in a special deposit to await the final determination of the appeal. If the final determination is in whole or in part in favor of the appealing taxpayer, the treasurer shall repay to him out of such deposit the amount of the tax paid upon the *valuation* held by the court to have been *excessive or non-taxable. The balance,* if any, or the whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a realization under the tax law concerned.*" (Italics ours)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*,

v.

EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.

No. 12,900

Appeal from the United States District Court for the District of Hawaii.

Before: DENMAN and ORR, Circuit Judges
YANKWICH, District Judge

On November 15, 1950, the appellants J. Elroy McCaw and John D. Keating began an action in the United States District Court for the Territory of Hawaii, against Torkel Westly, the then Tax Commissioner of the Territory of Hawaii. McCaw is a citizen and resident of the State of Washington. Keating is a citizen and resident of the State of Oregon. Since the commencement of the action, Earl W. Fase has succeeded Westly as Tax Commissioner.

In their complaint, the appellants attacked the validity and sought to enjoin the enforcement of a tax law, §5455(d) of Chapter 101 of the Revised Laws of Hawaii, 1945. The challenge was based upon the ground that the law was unconstitutional as applied to the appellants, who are operating a radio station, KPOA, under a temporary license issued by the Federal Communications Commission, in that the tax on the gross

receipts of the station was unconstitutional as a burden on commerce and an attempt to regulate and control an instrumentality of interstate commerce. Jurisdiction was invoked under 28 U.S.C. §§1331, 1332 and 1337. Declaration of rights was also sought under 28 U.S.C. §2201.

The appellee filed a motion to dismiss and a motion for summary judgment. These were heard together with the appellants' motion for a temporary injunction. On February 5, 1951, the Court entered its order dismissing the action without prejudice. In part it read:

> "The Court having laid aside the various motions of the parties and raised on its own the question of whether or not it had jurisdiction and if so, should it as a matter of judicial discretion exercise the same, and
>
> "The parties respectively having addressed themselves by way of argument to the questions raised by the Court, and
>
> "The Court being fully advised, for the reasons stated in its oral ruling dated January 24, 1951, it holds that although it has jurisdiction, in the exercise of sound judicial discretion it should not use such jurisdiction here, and accordingly."

In the oral ruling dated January 24, 1951, to which reference was made, the court stated, in effect, that while he had jurisdiction, he should not exercise it by reason of comity to the Territorial courts:

> "Basically the problem is this: Having jurisdiction, should this Court in its judicial discretion exercise it? I believe not, and for the following reasons: There is an excellent, long-standing adhered to policy, recently amplified by the Johnson Act,

which in effect says that contested tax statutes should be litigated in the courts of the sovereign which enacted the statute. In this case a state statute is involved, Territorial statute to be more exact. But the policy is that Federal courts will keep hands off of those situations and allow the state or Territorial courts to examine the validity or invalidity of their tax statutes. And this is but an expression of the interrelationship of two sovereigns under our Federal system of government. And it is a wise and sound policy as exemplified by the various cases with which you are all familiar, as well as myself. In other words, the Congress and the courts themselves have recognized that the Federal Government in none of its branches should interfere with taxation programs of the state and that all litigations relating to the validity of state taxation should be conducted in the state courts, the judges of which are likewise bound by the Constitution and laws of the United States. * * * And so that whether the Johnson Act as such can be said to apply—and I think it does for I think the word 'state' there should be broadly interpreted—but regardless, the policy exists quite apart from the Johnson Act, and most certainly the judicial discretion exists quite apart from either the Johnson Act or the policy.

"And all things being considered I do not think that judicial discretion in this instance should be exercised in favor of retaining and exercising jurisdiction because, as I see it here, the presumption is that the Territorial remedy provided to an aggrieved taxpayer is plain, adequate, speedy, clear and complete both in point of law and in point of equity."

In dismissing the action the trial court had in mind

the principle declared in such cases as *Matthews v. Rodgers,* 1932, 284 U.S. 521; *Great Lakes Dredge & Lock Co. v. Huffman,* 1943, 319 U.S. 293, 300-301; *Hillsborough v. Cromwell,* 1946, 326 U.S. 620; that suits to prevent the enforcement of a tax statute will not be entertained by the Federal courts when the statute has provided for payment under protest to be followed by an action in the State courts to recover the amount so paid.

This is an appeal from the judgment of dismissal. After the entry of this judgment, the appellants on March 21, 1951, paid the tax under protest. On May 3, 1951, they filed an action in the Circuit Court, First Judicial Circuit, pursuant to Section 1575 of the Revised Laws of Hawaii to recover the sum of $7,637.33 paid under protest. In the complaint they challenged the constitutionality of the statute upon the same grounds urged in the action from which this appeal is taken. Issue was joined by the Tax Commissioner. The case was tried without a jury. The territorial court, on January 28, 1953, made its finding holding the statute valid as applying only to the gross income of the business done by the appellants' radio station in the territory.

On a writ of error the judgment of the Circuit Court was affirmed by the Supreme Court for the Territory of Hawaii on June 8, 1953. *McCaw v. Fase,* 1954, 40 Haw. 121. An appeal was taken to this court on the same day. (26 U.S.C., §1293).

In an opinion filed today the judgment of the Supreme Court of the Territory of Hawaii is affirmed and

the contentions of unconstitutionality of the statute are rejected. So, whether the United States District Court in the present case was or was not justified in declining jurisdiction upon the grounds stated, or any other grounds, or whether the Johnson Act (28 U.S.C., §1341) does or does not apply to the Territory of Hawaii, is no longer a justiciable question,—for the entire appeal has become moot.

The appeal is therefore dismissed.

(Endorsed:) Opinion. Filed Oct. 30, 1954.

PAUL P. O'BRIEN, Clerk.

No. 480

ADDENDA TO APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*,
vs.
EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.
No. 12,900

APPEAL from the District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

(ENDORSED) Judgment
Filed and entered: October 30, 1954,
PAUL P. O'BRIEN, Clerk.

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No. 480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

J. ELROY MCCAW AND JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, Tax Commissioner of the Territory of Hawaii,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 466-472) is not reported.

The opinion of the Court of Appeals is reported in ..... F. 2d .....

JURISDICTION

The petition for certiorari seeks review under section 1254 (1) of the Judicial Code (28 U.S.C. 1254 (1)), of a case which reached the Court of Appeals for the Ninth Circuit upon appeal from the United States District Court for the District of Hawaii under sections 1291 and 1294 of the Judicial Code (28 U.S.C. 1291 and 1294).

QUESTIONS PRESENTED

Upon appeal from a judgment of the United States District Court for the District of Hawaii, which in an action attacking the constitutionality of a territorial tax dismissed the case without prejudice at the threshold on the ground that the case belonged in the territorial courts, did the Court of Appeals err in dismissing the appeal as moot when the territorial court case had reached it after trial on the merits in the territorial court and it had just filed an opinion upholding the territorial tax?

Assuming said appeal from the United States District Court of the District of Hawaii is not moot, was disposition on the merits in the District Court of the action attacking the constitutionality of the territorial tax a matter of right, and if not did the District Court abuse its discretion in dismissing the action?

STATUTES INVOLVED[1]

The statutes involved are as follows:

The Johnson Act (28 U.S.C. 1341). (This was cited by the District Court in dismissing the case but is not set out in the petition.) It reads as follows:

> "§ 1341. **Taxes by States.** The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[1] Statutes are set out as they read during the taxation periods involved and at the time this action was instituted.

Section 1575, Revised Laws of Hawaii 1945. (This is the section of the law under which petitioners, after dismissal of the District Court suit, brought in the territorial court the suit which became No. 13920 in the Court of Appeals, and which also is on petition for a writ of certiorari (No. 481 in this Court). This provision is not set forth in either petition. It read as follows:

"**Sec. 1575. Payment to Territory under protest.** Moneys representing a claim in favor of the Territory may be paid to a public accountant of the Territory under protest in writing signed by the person making such payment, or by his agent, setting forth the grounds of such protest, in which event the public accountant to whom such payment is made shall hold the money so paid for a period of thirty days from the date of payment.

"Action to recover the money so paid, or proceedings to adjust the claim may be commenced by the payer or claimant against the public accountant to whom the payment was made, in a court of competent jurisdiction, within such period of thirty days, and in default of bringing such suit or proceedings within such period, the money so paid shall be by such accountant deposited in the treasury of the Territory, and the same shall thereupon become a government realization.

"If action to recover the money so paid under protest, or proceedings to adjust the claim, shall be commenced within thirty days after payment of the money under protest, the amount so paid shall be transmitted by the public accountant to the treasurer of the Territory who shall hold the same as a special deposit pending the final decision of the cause. If the final decision of the cause shall be in favor of the claimant, the treasurer of the Territory shall pay to him out of such special deposit, such amount as shall have been adjudged to be due to him in such cause; the amount so to be paid to be ascertained by the treasurer from a certified copy of the judgment of the court, in which the cause was finally determined, which shall be his authority and warrant for such payment."

Section 5463 of the Revised Laws of Hawaii 1945, as amended by Act 253 of the Session Laws of Hawaii 1945. (This is the section of the territorial tax law specifying that delinquency penalties and interest are a part of the tax. It was applied both by the United States District Court in this case and by the Supreme Court of Hawaii in the other case, but is not set forth in either petition.) It read as follows:

> "Sec. 5463. Penalty for delinquency. A penalty of ten per centum shall be added to and become a part of any tax or portion thereof becoming delinquent, and in addition thereto said tax as so increased shall bear interest at the rate of two-thirds of one per centum for each month or fraction thereof from the expiration of fifteen days from the date of delinquency until paid, which interest shall be added to and become a part of such tax."

STATEMENT OF THE CASE

On November 15, 1950 petitioners filed this action in the United States District Court (R. 3-30). They are a co-partnership known as Island Broadcasting Company, and at that time were operating radio station KPOA in Honolulu, Territory of Hawaii.

The complaint (R. 3-30) attacked the validity of section 5455, subsection D, Chapter 101, Revised Laws of Hawaii 1945, a territorial tax law, which applies to the business of radio broadcasting as well as other business. Jurisdiction was invoked under 28 U.S.C. 1331, 1332, and 1337. The complaint sought both equitable (R. 29) and declaratory (R. 27) relief. Petitioners moved for a temporary injunction (R. 36), and for summary judgment (R. 113-131).

The territorial tax commissioner (whose successor in office is the respondent here and who will be referred to as "respondent") filed a motion to dismiss the complaint, attacking it for failure to show grounds for equitable relief, for failure to take the case out of the Johnson Act (28 U.S.C. 1341) and the policy therein set forth, and upon other

grounds (R. 36-40). Respondent also filed Objections to the Motion for Interlocutory Injunction (R. 40-52), and a Motion for Summary Judgment (R. 141-144).

Each party filed supporting affidavits and exhibits. Petitioners' appear at R. 30-34, 114-131, 154-157 together with a number of unprinted exhibits; respondent's appear at R. 52-113, together with a number of unprinted exhibits.

When the cause came on for hearing on the motions the Court "laid aside the various motions of the parties and raised on its own the question of whether or not it had jurisdiction and if so, should it as a matter of judicial discretion exercise the same" (R. 159). After hearing argument thereon, for which very considerable time was allowed, the Court ruled (R. 466-471):

> That the Territory of Hawaii is so constituted under the Hawaiian Organic Act that its tax litigation is protected by the Johnson Act (28 U.S.C. 1341) and the policy therein set forth (R. 468).
>
> That the remedy of the taxpayers was to pay under protest and sue for a refund in the territorial court, this being an adequate statutory remedy and there being adequate provision elsewhere made for interest (R. 469).
>
> That under the statute penalties became part of the tax and were recoverable if the tax was recoverable (R. 469).
>
> That if grounds for an equity application existed the taxpayers could resort to the equity court of the Territory, there being no statute prohibiting such an equity suit (R. 470).
>
> That the complaint would be dismissed but such dismissal would be without prejudice, in order that the taxpayers might return to the federal court if, contrary to the conclusions reached, the taxpayers could not obtain hearing on their contentions in the courts of the Territory (R. 471).

The above ruling was made January 24, 1951 and Judgment Dismissing the Action Without Prejudice was entered thereon February 5, 1951 (R. 159-160).

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> That the complaint would be dismissed but such dismissal would be without prejudice, in order that the taxpayers might return to the federal court if, contrary to the conclusions reached, the taxpayers could not obtain hearing on their contentions in the courts of the Territory (R. 471).

The above ruling was made January 24, 1951 and Judgment Dismissing the Action Without Prejudice was entered thereon February 5, 1951 (R. 159-160).

Petitioners thereafter brought an action in the Circuit Court of the Territory, First Circuit, employing the statutory remedy of payment under protest followed by suit for recovery.[2] This action was tried, resulting in findings of fact and conclusions of law of the territorial circuit court, which were affirmed by the Supreme Court of Hawaii. On appeal from the Supreme Court of Hawaii, the Court of Appeals in its No. 13920 affirmed the judgment below, on grounds which appear from the Statement of the Case in the Brief for the Respondent in Opposition to the Petition for Certiorari in that case, No. 481 in this Court.

Meanwhile, petitioners had appealed from the judgment dismissing without prejudice the action in the United States District Court. In No. 12900 in the Court of Appeals that court quoted the ruling of the United States District Court and said:

> "In dismissing the action the trial court had in mind the principle declared in such cases as *Matthews v. Rodgers*, 1932, 284 U.S. 521; *Great Lakes Dredge & Lock Co. v. Huffman*, 1943, 319 U.S. 293, 300-301; *Hillsborough v. Cromwell*, 1946, 326 U.S. 620; that suits to prevent the enforcement of a tax statute will not be entertained by the Federal courts when the statute has provided for payment under protest to be followed by an action in the State courts to recover the amount so paid." (R. 484; Pet. App. 9A-10A.)

However, the Court of Appeals, having just filed its opinion in its No. 13920 upholding the territorial tax (No. 481 in this Court) dismissed the appeal from the United States District Court as moot and accordingly did not decide whether the United States District Court was or was not justified in declining jurisdiction, or whether the Johnson Act (28 U.S.C. 1341) does or does not apply to the Territory of Hawaii.

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[2] Section 1575, Revised Laws of Hawaii 1945 (supra, p. 3).

By way of correction of page 11 of the petition, respondent states that this case and the other case in the Court of Appeals (No. 481 in this Court) were not consolidated, as appears from Appendix 12-16 of Respondent's Brief in No. 481. The cases merely were consolidated for argument. A separate opinion and separate judgment were rendered in each case, as appears from the Transcripts of Record.

Other corrections of Petitioners' Statement of the Case will be made in the argument below.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN DISMISSING THE APPEAL AS MOOT.

Petitioners assert that the United States District Court, on the motions filed in that Court, should have rendered judgment on the merits (Pet. 2-3, 6, 28). In this case, as in the other case on petition for certiorari, the merits are argued in the petition (Pet. 13-28).

This case was not tried, the other case was. It is the theory of the petition that the merits should have been passed upon by the District Court without a trial. Thus petitioners seek to lay aside the facts which emerged upon a full trial. Those facts showed that petitioners' radio station in Honolulu does not occupy the position of the two state of Washington stations involved in *Fisher's Blend Station v. Tax Commission*[3] as to which the facts were stipulated in 1935. Respondent's brief in No. 481 has developed this in Point II-A.

The record in the United States District Court was sufficient to show a dispute on the facts and preclude petitioners from obtaining a summary judgment.

Petitioners alleged in the District Court (R. 17, par. XIII) that their broadcasting was predicated upon a "service area" extending vast distances. In the exhibits incorporated in respondent's Objections and respondent's Motion for Summary Judgment, respondent demonstrated that peti-

[3] 297 U.S. 650.

tioners' theory as to their service area could not be accepted in any pretrial proceeding and that they could not possibly, as a matter of law, occupy the position the two Washington stations were stipulated to have in the 1935 case. Respondent:

> Produced the F.C.C. Regulations and Standards of Good Engineering Practice showing that a regional station,[4] instead of being designed for effective transmission over an entire zone, as in 1935,[5] under the present F.C.C. regulations "is designed to render service primarily to a metropolitan district and the rural area contiguous thereto." (R. 44-45; 47 C.F.R. Sec. 3.22 [c].)
>
> Showed by the F.C.C. Standards of Good Engineering Practice that a Class III-A station[6] is "normally protected to the 2500 uv/m groundwave contour nighttime and the 500 uv/m groundwave contour daytime" (R. 44-45; 47 C.F.R., 1949 edition, p. 120), and produced the map filed by petitioners with their application for a F.C.C. license, showing these protected contours (R. 86) which do not even include the whole of the Territory of Hawaii.
>
> Produced F.C.C. computations showing that, according to the F.C.C. standards and graphs, a station such as petitioners' is not expected to render satisfactory service at the distances claimed by petitioners (R. 45-47, 84-85, 89-90. Compare R. 120, 122, 124-126, 216-217).

It at no time was conceivable that the Court of Appeals would proceed to the merits when the trial court had not done so.[7] And the futility of remanding the case to the United States District Court for consideration of the merits when the territorial court case had been tried and judgment

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[4] Petitioners' station is on a regional channel (R. 149).

[5] Compare the stipulated facts in the *Fisher's Blend case*, set forth in Respondent's Brief in No. 481, p. 22.

[6] Petitioners' station is a Class III-A station (R. 149).

[7] *McDonald v. Smalley*, 1 Peters 620, 7 L.Ed. 287; *Bradstreet v. Potter*, 16 Peters 317, 10 L.Ed. 978.

reached on the merits is equally apparent.[8] Thus, whichever way the Court of Appeals ruled in the appeal from the territorial court case there was no substantial question remaining in the appeal from the United States District Court.

Respondent further submits that the United States District Court rightly dismissed the action, as shown in the next point.

II. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DID NOT ERR IN DISMISSING THE ACTION ON THE GROUND THAT THE CASE BELONGED IN THE TERRITORIAL COURT.

A. Scope of the Johnson Act; the policy involved.

The Johnson Act (28 U.S.C. 1341) provides that:

> "§ 1341. **Taxes by States.** The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This statute is derived from the Act of August 21, 1937.[9] It was founded on the already long established policy of remitting taxpayers to their remedies in the state courts where adequate.[10] Congress particularly desired to free, from interference by federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid.[11] Under the statute and long established policy on

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[8] *Mullaney v. Anderson*, 342 U.S. 415 (Pet. 33) does not sustain petitioners but on the contrary is an instance of this Court allowing parties to be added in order to preserve the status of a case which had been fully tried and judgment reached below on the merits, rather than have the case start over again.

[9] 50 Stat. 738, c. 726, amending the first paragraph of section 24 of the old Judicial Code, former 28 U.S.C. 41 (1). The Act added a sentence to provide that "no district court shall have jurisdiction" of any suit to restrain state tax collection where an adequate state court remedy exists "at law or in equity." The Reviser's Notes show that section 1341 restates this sentence, the words "at law or in equity" having been omitted as unnecessary.

[10] *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-301, citing *Matthews v. Rodgers*, 284 U.S. 521, 525-6.

[11] *Great Lakes Dredge and Dock Co. v. Huffman, supra*, citing S. Rep. No. 1035, 75th Cong., 1st Sess.; H.R. Rep. No. 1503, 75th Cong., 1st Sess.

which it was based, it is true, whether the relief sought is equitable or declaratory, that:

> "* * * it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back."[12]

The Johnson Act and the policy there stated apply, as well, when the taxpayers can be heard in a state court for equitable relief. A decisive case is *Whitmore v. Ormsbee*, 329 U.S. 668, aff'g per curiam 64 F. Supp. 911. A three judge court had ruled that radio broadcasting is in part intrastate commerce and in part interstate commerce (the court citing the *Fisher's Blend case*, 297 U.S. 650, which petitioners interpret differently), that the question involved was whether the state tax imposed an undue burden upon the interstate commerce, that the Johnson Act applied to this question as well as any other, that the ordinary method of payment under protest was adequate, and that if this method should be burdensome by reason of the large amount of accumulated back taxes and penalties, then equitable relief in the state court would be an adequate remedy, and this notwithstanding a state statute forbidding injunctive relief in tax cases which, however, the state courts had held did not apply in extraordinary circumstances. Hawaii has no statute limiting injunctive relief in tax cases. This Court affirmed the *Whitmore* case per curiam, upon the authority of *Hillsborough v. Cromwell*[13] upon which petitioners rely, and *Matthews v. Rodgers, supra*.[14]

B. Applicability of the Johnson Act in Hawaii.

The Johnson Act and the policy there stated apply in Hawaii. The courts of the Territory of Hawaii occupy a

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[12] *Great Lakes Dredge and Dock Co. v. Huffman, supra*, 319 U.S. at pp. 300-301 (a declaratory relief case); *Toomer v. Witsell*, 334 U.S. 385, 392 (injunctive relief case).

[13] 326 U.S. 620, 623.

[14] 284 U.S. 521, 525.

relatively similar position to the federal courts as do state courts, and this principle makes applicable the rules of law as to the types of litigation to be left by federal courts to state courts.[15] Such a rule is involved here.

It is not material whether the Johnson Act applies by its terms, the word "state" being read to include territories as it sometimes is,[16] or whether it applies because the Hawaiian Organic Act and the case law make applicable the policy stated in the Johnson Act.[17] Whether or not the statute literally applies, the District Court properly adhered to the long standing policy expressed in it.[18]

C. Petitioners did not meet the Johnson Act.

The complaint set forth that the time for appeal to territorial courts had expired (R. 27, par. XXIV); that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery (R. 28, par. XXV); that "the slightest financial burden" would affect petitioners and they had invested in the station in the belief that Congress had pre-empted the field of radio communication (R. 8, par. V; R. 22-23, par. XIX). These, and other contentions since made, will be considered in the following paragraphs. In none of them did the petitioners meet the Johnson Act or the policy there set forth.

1. The theory of the complaint that, by letting their time for appeal expire, petitioners excused themselves from resorting to territorial courts, in any event is met by the fact that another remedy remained, that of payment under protest followed by suit for recovery under the statute, section 1575 of the Revised Laws of Hawaii 1945, supra p. 3. Un-

[15] *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383; *Ackerman v. I.L.W.U.*, 187 F. 2d 860, 868 (C.A. 9th), cert. denied 342 U.S. 859; *Alsna v. Rice*, 172 F. 2d 176, 178-9 (C.A. 9th), cert. denied 338 U.S. 814; *Wilder S.S. Co. v. Hind*, 108 Fed. 113, 115, 116 (C.A. 9th), aff'd 183 U.S. 545.

[16] *Andres v. United States*, 333 U.S. 740, 745.

[17] Note 15, *supra*.

[18] *Great Lakes Co. v. Huffman*, supra; *United States v. City of New York*, 175 F. 2d 75 (C.A.. 2d), cert. denied 338 U.S. 885.

der this latter statutory remedy action was brought by petitioners in the territorial court (No. 481 in this Court). This statutory remedy has been employed in the Territory in many instances to determine the applicability and validity of territorial tax laws,[19] and is not uncertain.

Hillsborough v. Cromwell, 326 U.S. 620, on which petitioners rely (Pet. 2, 5-6, 35-36) does not hold that one can take himself out of the Johnson Act by not pursuing his state remedy; it holds that a state remedy is inadequate which affords no reduction of a tax assessment in the event of discriminatory taxation, permitting only that the taxpayer discriminated against obtain an increase in the taxes of others.

2. The allegation in the complaint that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery, overlooks that the suit for recovery is not against the Tax Commissioner personally but to the contrary is a statutory remedy that in effect is a suit against the Territory of Hawaii.[20]

3. The allegation in the complaint that the imposition of the tax was unexpected and any tax at all would be a burden, is met by *Whitmore v. Ormsbee, supra*, which holds that if there are extraordinary circumstances precluding resort to the ordinary method of payment under protest, then resort should be had to the state equity court, the Johnson Act having the effect of remitting the taxpayer there. Moreover, this allegation falls short of an allegation of inability to pay. Instead, the complaint alleges refusal to pay (R. 28, Par. XXV). Furthermore, respondent showed by the affidavit of the deputy tax commissioner and the books of the company (these exhibits being incorporated by reference

[19] *Brodhead v. Borthwick*, 174 F. 2d 21 (C.A. 9th), aff'g 37 Haw. 314, cert. denied 338 U.S. 847; *Pan American Airways v. Godbold*, 36 Haw. 170; *Wright v. Borthwick*, 34 Haw. 245; *Bishop v. Hill*, 33 Haw. 371; *New York Life Ins. Co. v. Hapai*, 21 Haw. 424.

[20] *Wright v. Borthwick, supra*, 34 Haw. 245, 255; *Great Northern Insurance Co. v. Read*, 322 U.S. 47; *Ford Co. v. Department of Treasury*, 323 U.S. 459.

in the Objections to Interlocutory Injunction [R. 51] and Motion for Summary Judgment [R. 143]) that the imposition of the tax was not unexpected or beyond the financial ability of the company (R. 53-54, 93-108).

4. In oral argument appellants made the further contention, not contained in the complaint, that if they paid under protest and were successful in sustaining their contentions as to the invalidity of the tax, they would not be refunded that portion of their payment consisting in the delinquency penalties and interest by which the tax had increased due to failure to resort promptly to the remedy of payment under protest. The petition relies on this argument (Pet. 5, 7-9, 36, 38-39, 40).

This argument seeks to overlay on section 1575 (supra, p. 3) certain provisions concerning the administrative tax appeals which petitioners did not take, and which accordingly are not involved. Moreover, petitioners place a forced misconstruction on those provisions. The argument assumes, in flat disregard of the pertinent statutory provision,[21] that the word "tax" does not include penalties and interest added to the tax and becoming "a part of such tax," as the statute provides. Of course the rule is that words used in a statute mean what the statute says they mean.[22] This obvious answer was made in the District Court (R. 272), and the court so ruled, saying:

> "* * * the particular law under which taxes claimed to be due makes any penalty that is assessable a part of the tax, and if the tax is recoverable, why, the part goes with it, for the whole consists of all of its parts." (R. 469.)

Of course if the tax is valid and not refundable the penalties are not refundable either. The rule in Hawaii is the

[21] Section 5468, supra p. 4.

[22] *Fox v. Standard Oil Co.*, 294 U.S. 87, 95, stating the general rule; *State of California v. Hisey*, 84 F. 2d 802, 805 (C.A. 9th) stating the rule that penalties and interest are a part of a tax when and to the extent that the tax statute so provides.

usual rule, i.e., where the tax law provides for penalties and interest, one who contests a tax is liable to delinquency penalties and interest upon the amount found to be legally due if not paid on time.[23] The taxpayer who desires to avoid this should promptly put up the tax money that is in litigation.

5. Petitioners now say that "it was agreed by the parties that this suit would be initiated in the U. S. District Court"

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[23] The Supreme Court of Hawaii so ruled in the territorial court case (No. 481 in this Court), citing section 5463 (supra p. 4) which makes delinquency penalties and interest a part of the tax, and also citing many cases. The Supreme Court said:

"Although, as we have said, supra, the complainants' assignment of error number 33 has been waived by the noninclusion thereof in their specifications of error—and, also, their failure to present either argument or authorities pertinent thereto—but, nevertheless, to avoid any possible uncertainty which might arise because of our failure to consider whether interest and penalties should be added to a delinquent tax, we declare that the rule of law is that interest and penalty shall be added to a tax lawfully payable, whenever there has been failure to pay such tax when due, and same has become delinquent, the interest and penalty automatically following the former pursuant to statutory provisions. Section 5463, Revised Laws of Hawaii 1945, as amended by Act 253 of the Session Laws of Hawaii 1945.

"Further, there is a well-established rule that where a tax law provides for penalties and interest, one who contests the tax does so in peril of the penalties and interest, and is liable for penalties and interest upon such amount unpaid as is found to be legally due.

"See Spencer v. Babylon R.R. Co., 250 Fed. 24 (C.A. 2d), a case arising in New York; Washington Water Power Co. v. Kootenai County, 270 Fed. 369, as modified 273 Fed. 524 (C.A. 9th), a case arising in Idaho; State of California v. Hisey, 84 F. 2d 802, 805 (C.A. 9th); State v. Holly Sugar Corp., 57 Wyo. 272, 116 P. 2d 847; State v. Great Atlantic and Pacific Tea Co., 190 La. 925, 183 So. 219, cert. denied 305 U.S. 637; Citizens' Waterworks v. Hughes, 362 Ill. 136, 199 N.E. 265, and People ex rel Stuckart v. Chicago etc. Ry. Co., 270 Ill. 477, 110 N.E. 720; Brittain & Henry v. Robertson, 120 Miss. 684, 83 So. 4, and Hamel v. Marlow, 171 Miss. 559, 157 So. 905; Rixeys Executors v. Commonwealth, 125 Va. 337, 99 S.E. 573, 101 S.E. 404; Power v. City of Detroit, 139 Mich. 30, 192 N.W. 288; Western Union Tel. Co. v. State, 64 N.H. 265, 9 Atl. 547, and Winnipiseogee Lake Mfg. Co. v. Gilford, 64 N.H. 514, 15 Atl. 137; Cedar Rapids & M. R. Co. v. Carroll County, 41 Iowa 153, 191; Jaggar v. David, 121 Kan. 737, 250 Pac. 260."

(Record in No. 481, 117-119)

(Pet. 4). In the District Court petitioners' counsel admitted that the Territory always had disagreed with petitioners' position that the federal suit was the proper remedy and had made no agreement to waive the point (R. 226, 264-266, 290-293, 330).

6. Petitioners (Pet 5, 10, 18, 24, 30, 40) assail the procedure followed by the territorial circuit court (the trial court) in the rendering of the decision in the territorial court case, now on petition for certiorari in this court as No. 481. This matter is covered by Respondent's Brief in No. 481 at note 4, and on pages 12, 36-37.

7. Under the rule of *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 104, 105-106, even if the Johnson Act and the policy therein set forth did not apply nevertheless this case would have had to be held in the District Court awaiting the outcome of territorial litigation. This was true because the scope and application of the tax law in respect of radio broadcasting had not been determined by the territorial courts. (See R. 301-302, 379-382.) The rule that state courts must construe state statutes before constitutional issues are reached, applies in the Territory of Hawaii.[24] Hence, the District Court suit did not afford a speedier route, if that be material. (See Pet. 9)

8. Concluding this point, respondent calls attention to the case of *Georgia R. R. and Banking Co. v. Redwine*.[25] There, on a suggestion by the Attorney General of Georgia that there was an adequate state court remedy, a case that had made its way up to this Court was "ordered continued for such period as will enable appellant with all convenient speed to assert such remedies." It was not until the state court remedies had been tried and had been proved inadequate that the case was finally heard in this Court; it then was remanded to the District Court for determination of the merits. This case demonstrates the strength of the Johnson Act policy.

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[24] *Stainback v. Mo Hock Ke Lok Po*, supra, 336 U.S. 368, 383.
[25] 339 U.S. 901, 342 US. 299.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RHODA V. LEWIS
Deputy Attorney General of Hawaii
Counsel for Respondent.

January 7, 1955.

End